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Michell, Arthur A.

An addrress on the subject of ancient English deeds

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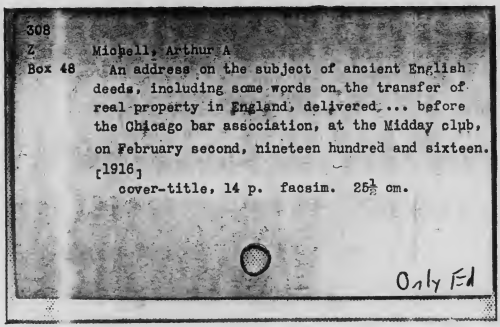

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AN ADDRESS

On the subject of

Ancient English Deeds,

Including Some Words on the Transfer of Real Property in England,

Delivered by

Mr. ARTHUR A. MICHELL,
of the New York Bar,

Before the Chicago Bar Association, at the Midday Club,

On February second,
Nineteen hundred and sixteen.

The talk, which is reproduced in the following pages, was announced by the Entertainment Committee by card reading as follows:

THE CHICAGO BAR ASSOCIATION WILL GIVE AN INFORMAL DINNER AT THE MIDDAY CLUB ON WEDNESDAY, FEBRUARY SECOND, NINETEEN HUNDRED SIXTEEN, AT SIX-THIRTY O'CLOCK

OUR GUEST WILL BE

MR. ARTHUR A. MICHELL

Solicitor of the Supreme Court of Judicature in England, now practicing at the New York Bar

The evening will be devoted to a discussion of the law of conveyancing as developed in English jurisprudence, the speaker tracing its changes from the days of the Anglo-Saxon, through the period of the Norman, up to the present, exhibiting a number of original parchments and illustrating his talk by stereopticon reproductions of more than fifty old deeds in their proper sequence of time. Mr. Michell has made a most interesting collection of old English deeds and parchments, having every deed mentioned in Blackstone's Commentaries. The exhibition of these ancient deeds alone will be a matter of peculiar interest to our members. An evening's review of the sources of the law of conveyancing can but prove instructive as well as entertaining.

Mr. Chairman, Gentlemen of the Chicago Bar, and Lady Lawyers:

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Till the middle of the 18th Century Landed Estates in England might be held by the same ancient tenures, and upon the same feudal principles, as were in force under the early feudal sovereigns. This, in part, tells the story of the wonderful continuity and organic life of England.

One concrete instance will suffice. In the year A. D. 872, the Church of England leased a piece of land to the English Crown to be used for military purposes, for a term of 999 years. Upon the expiration of this lease, some 45 years ago, the highest civil court in England adjudged the reversion to be in the original owner, the party that gave the lease.

The *practical* value of these historical enquiries, with regard to the possession and transmission of land, is, of course, on the decrease, in view of modern legislation; yet, without this previous knowledge, no student can comprehend the progress, made through nine centuries, in the rights of men to control the ownership of land.

The *Feudal System* first finds a place in all that concerns real property and, under William the Norman, became part of the national constitution, though not at once. The slaughter of the Saxon nobles was so complete at Hastings, and there ensued such numerous forfeitures, that the King found himself land-rich.

It is a mistake to suppose that the feudal system was the creation of William. The Normans themselves had long lived under the feodal law.

With them as with the Goths, Huns, Franks, Vandals and Lombards, it was a military law of necessity, as each man swore to defend the other from all outside attack. Later we find the same spirit of trades-unionism in the Frankpledge, which I hope to tell you of later, under Manorial customs. William merely transplanted and perhaps developed it, and its forms and theories remain to the present day, although, both in spirit and substance, feudalism has passed. Some assert, for its origin, we must give credit to German *Kultur*.

Once the only kind of wealth was land, and what it produced This was all the Monarch could give by way of reward.

The King granted the land to favored subjects, subjects whose fidelity it was necessary to secure and in places when they could do best service for their lord, but *upon conditions* which created a feudal relationship between lord and tenant. It was part of a sound military policy.

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These holdings were called feoda, feuds, fiefs, or fees; which mean a conditional reward, or stipend.

The adoption of this feudal system was the cause and the consequence of the power of the barons, for they themselves obtained landed wealth and personal power; and by insisting on the acceptance of fiefs by others under themselves, they insured their own safety and created a Committee of safety for their tenants.

It is from this that the maxim arose that no land can be unowned, meaning that the feudal seizin could never be without an owner. It was only one step further to say that the King was proprietor of all the lands.

This is what one English King had put on the Statute Book: "The King is the universal lord and original proprietor of all the lands in his Kingdom; that no man can, or doth, possess any part of it, but what has mediately or immediately been derived as a gift from him to be held upon feudal services." (24 Edward III. c. 65)

Now, King Pharaoh in 1700 B. C., was of exactly the same opinion, for we read in Genesis XLVII. v. 20-23:
"And Joseph bought all the land of Egypt for Pharaoh . . . So the land became Pharaoh's . . . Then Joseph said unto the people: And it shall come to pass, in the increase that ye shall give the fifth part unto Pharaoh and four parts shall be your own."

We all remember this old Monarch, Pharoah, King of Egypt, and we wonder how much he did really pay for "all the land of Egypt." He probably satisfied his conscience by adopting as his motto the old feudal axiom that "the King can do no wrong." Our modern democratic idea is "the King must do right." But with Pharaoh we find history not repeating itself for we read (v. 22) "only the land of the priests bought he not." Pharaoh's reverence for the land-owning ministers of religion was not shared by the English Monarchs. In Egypt there were no "Mortmain" Acts.

So this original absolute ownership, or claim of ownership, by the Crown is very important, for in it began and ended the feudal system.

William of Normandy had so much to give away that his Barons themselves were land-rich, they could not farm all they had, so they parcelled out to others, Lords of the Manors, what they could not afford to keep, and we may well imagine that the Norman Barons in the process of subinfeudation, or substituting other donees in place of themselves in the scale of tenure, added various new hardships or services, "great grievances," as the Act of Henry I. styles them, (I Henry I c. 1). King Henry III gave up these great grievances although he retained the fiction of "feudal tenure." Yet the burdens revived, until in the time of John "Lackland" they had become so intolerable as to compel the

Barons, the principal feudatories, to rise in arms and compel a restoration of their own ancient prerogatives, of which they themselves had really, and almost without knowing it, been robbed by the "art" and finesse of the Norman lawyers.

And, now, before I proceed to the deeds (the actual forms of which I am later to show you on this screen), and trace the changes, which the "art" of the conveyancers of those "good old times" evolved, in order to evade the statutes which the Crown was continually having passed, in an effort mainly, to curb the acquisitiveness of the Church, I will point out certain matters of interest, some of which are side-lights on the civic history of England.

Except in Middlesex (London) and the Ridings of Yorkshire, and a few districts, such as Bedford Level and Kingston-on-Hull, there is not, and never has been, any deed recording in England. I omit the enrollment of deeds under Acts to which I shall later refer and the Torrens system, which has proved a failure and which provides for an optional registration. This has been proved a distinct advantage to the "learned" profession of solicitors; for with the dislike of change, so insular and continental, the family lawyer is little changed, and having possession of the title deeds, he and his successor in office is often continued through several generations. The fact that the law presumes a recital in a deed to be true after twenty years, makes it unnecessary to hand over to the purchaser the old deeds, and they become mere heirlooms or objects of curiosity. I do not mean that these ancient grants have never been recieved as direct evidence in Courts of Law, in these latter days; they certainly have been and I have already instanced a reversion, after a nine hundred and ninety-nine years' lease, claimed and allowed, and this by reason of the production of the lease itself.

When was writing first a requisite of a valid deed, either by the custom or Statute Law?

Who framed and wrote these centuries-old parchments, which are to come before you this evening, exactly as they left the scriveners' hands?

What is the composition of ink and sealing wax? What, if anything, is indicated by the shape and color of the seals?

Some of you, who are more scholarly, may ask how mediaeval latin differs from our twentieth century classical latin? When did english supersede latin as the law language of the courts.

Going back to a period antedating the Norman Conquest, there are to be found deeds, both in Saxon and latin, plainer and more legible than those of subsequent eras, and less obscured by abbreviations. Indeed they much resemble the deeds of the three centuries following the Conquest, being short, clear and business-like, and this is due to the fact that the professional Cleric was

the scrivener. Handwriting was a profession by itself, and, because all education was monastic, you will observe that the writing of the old deeds is formally methodical, and it was only after England had shaken off the yoke of Rome that any marked change took place in handwriting. The earlier religious houses were largely seminaries and the clergy had their own collection of forms, and in the later thirteenth century we begin to find books of precedents and a series of mechanical forms. Broadly speaking, before Edward I. (1272) there are few deeds. He was the "English Solon" who revised the national laws.

Coming to language, we are told that King Alfred translated many Saxon works into latin and for many centuries latin was the accepted "volapuk," understood by all who professed any learning, for Rome was the light of the Western World. Only for a short time did norman-french partially supersede latin, and not immediately following the Conquest; but latin held its own always among scholars, and as the language of the Church, until in the sixth year of Edward III, latin became the law-language. By the late 15th century latin had had its day and english settled down into the language of the people, and began to be used in law transactions. Finally in the time of George III, english was ordered used for law work, as it had been, actually, since the year 1600, and latin became obsolete.

No student in mediaeval law charters gets far in his studies without finding out that the old-world lawyers coined words, and words of native origin became latinized. This adds to the difficulty of translation, for there has never been published a latin-english dictionary, with which to interpret these old records.

I must not take up your time with any effort to explain the formidable obstructions to the study of these deeds caused by abbreviations. These deeds, you will say, as you try to read even a few lines, are written in a cryptic language.

This is somewhat a fact. The Clerics tried to save time and space and wrote mostly from dictation. They spelt sometimes phonetically and abbreviated on top of that. There are contractions explained by marks above and below and even through a letter and various differing marks at that; some letters have several separate satellites, and many abbreviations conform to no rule, and most would seem to depend on the eccentricity of the scribe.

The Saxons, such as could write, signed their deeds, and whether they could write or not, affixed the sign of the cross, a custom said by some to have been brought from the Holy Land by the Crusaders; who swore on the sword-hilt, a knightly and binding asservation. The Normans, brave but illiterate, introduced their own methods and were content to seal their deeds and not sign; and this custom continued right through the 13th

century and even later. This absence of signature is surprising, since, as far back as the 5th Century B. C., we find Jeremiah the Prophet buying the field of his cousin Hananeel, and he says: (c. 32 v. 8)

> "And I bought the field of Hananeel, and weighed him the money, and I *subscribed* the evidence and *sealed* it and took witnesses."

The inks of the ancients have nothing in common with ours except color and the gum used to obviate a too great fluidity.

You will agree with me, if you have observed the twelfth and thirteenth parchments in the ante-room, that they excel modern inks in richness of color and, certainly, in stability. Examine modern documents, not half a century old, yes, not twenty years old, in your own Cook County record offices, and notice the difference. Each scribe made his own ink from his own formula, principally out of oak galls and sulphate of iron. The red inks were not popular, but I have some deeds so written, made from oxide of iron perhaps, and one in green ink which, a chemist tells me, has for its base sulphate of copper.

Cooke has defined a seal as "wax with an impression," How old this practice of sealing an instrument is, can be gathered from the fact that the ancient Egyptians employed seal rings, and the practice of appending the seal to slips of parchment seems entirely Egyptian. Those pendent seals continue to the Stuart period, in the seventeenth century. You will find in the Bible that a seal was the sign of authenticity. (1 Kings 21, 8; Esther 8, 8.)

A man's seal was usually destroyed at his death to prevent fraudulent use.

In my collection, covering one hundred and fifty odd documents, I have met with only one black seal and only one green one. White wax was popular to the end of the twelfth century, then green seals appear, to be replaced continuously by red.

Few seals with private devices are found before the fourteenth century.

In shape we find them ovoid or triangular, and round.

You will notice a curious way of preserving the seal attached to many later documents, evidently by encasing the hot wax in thin paper and impressing the seal through the wax and paper.

If you ask me what the ancient wax is composed of, I can only suggest bees' wax, plaster and some coloring matter. My efforts to melt this wax has resulted in a most distressing odor, compelling the wisdom of laboratory experiments.

The size of these big parchments, many running into 2 and even 3 "skins" will amuse and perhaps shock you. The mass of verbiage, the reduplication in the "general words" following the description, must be due to something. In a small

parchment of 1655, the general words following the description and beginning "together with all and singular the houses, outhouses, edifices, buildings, barns, stables," (six words for one idea) number 276.

What did the lawyers charge;—rather, what amount were they limited to by the false economy of the public? One shilling (25 cents) for every 72 words (an English folio). The best I can say of the lawyers is they did not increase the length of deeds. They had early fixed on long precedents, "common forms," full of synonyms and expletives, and they did not shorten them.

And the bill of the Conveyancer was liable to be taxed on request of an exacting client. (6 & 7 Vict. c. 73, sec. 38).

Now, the scale of payment is fixed by the Conveyancing Act of 1881 and the forms are shortened by Statute, until a "short form" English deed is a model document.

Before this Conveyancing Act of 1881, it was said that a common purchase *deed* of a piece of freehold land could not be explained without going back to the time of Henry VIII. and the *STATUTE OF USES*, or an ordinary settlement of land without recourse to the laws of Edward I, the *STATUTE DE DONIS*, to which estates tail owe their origin. This has been a matter of regret, for while antiquities are interesting, their intrusion into the modern practice of law and the *necessity* of acquaintance with them gives rise to difficulty and error in nonstudious practitioners.

We all know the word "indenture." It means a deed or paper writing indented, that is, vandyked originally in an acute angle (*instar dentium*) along the top edge. This vandyking, later done in a mere wavy line, was considered necessary in the days when, because there was no record of instruments, each party received a duplicate original. And the edge of each duplicate original, whether two or several, thus exactly corresponded. At first the two originals were written on the same parchment, as we would say "back to back" and the word "chirographus" (the equivalent of our word "engrosser") was written between them, along the centre line of the skin; thus the cutting or vandyking exactly bisected the word. You will notice later Fines were indented on top and on one side, which with the third copy, kept by the Court itself, made a very safe protection to the purchaser. The Chinese laundry ticket was perhaps the precursor of the idea. Deeds were still carefully indented in the days of my clerkship, although rendered entirely unnecessary by statute.

I have told you nothing, so far of the scriveners, the clerics, whose careful and beautiful writing you must admire, done with a goose quill; and you will, later, notice many deeds tested in the name of the cleric himself, described only by his christian name, with the appellation *clericus* and the words: "qui hanc cartam

scripsit." There were few surnames in the country districts in the days of the Edwards. A man was known by the name of his trade—his village home—and often by some nickname due to some eccentricity of manner or appearance; often by adding "son" to the father's name; and you will find even the great Norman and English names teach this. I have heard of the names in old deeds of Crackpot, Steadyfote, Proudfellow, Whitehead, Redman, Goodman, and we know many Thompsons, Jacksons, Petersons, etc.

In mediaeval time the people were divisible into only two classes, clergy and laity.

The Church of England today has its three orders of Bishops, Priests and Deacons; but, then, there were sub-deacons and sub-sub-deacons, and anyone who could write his name and was in the way of getting an education, could ask the Bishop to be ordained, and meantime, as a cleric, affiliated to the Church, he would claim some of the privileges of the clergy, and became subject to its control and to the laws of the Church. I expect they were a sorry lot, attaching themselves to some big "house" and acting as ushers, librarians, law clerks, tutors and doing anything for their board and lodging. But they benefited thereby.

The law of the land was inexpressibly brutal and death was no farther from any man's door than in the days of ancient Rome, and branding, ear and nose splitting and mutilation were matters of daily occurrence everywhere. Then, and now, the criminal law was the transmutation of private into public revenge. But the law of the Church was comparatively gentle—it claimed the right to try and punish its own clergy and, an appeal to be tried by the Church, when claimed by a cleric, could not be gainsaid. This very gentleness, or partiality, of the Church helped to its undoing and the destruction of monasticism was to some extent helped by the failure of the Church to mete out punishment to its clerical sinners. At the dissolution of the Monasteries the number of criminals who had claimed "sanctuary" in the abbeys was very large. Thomas Cromwell mostly made quick work of them and hanged them out of hand.

Just a word here, in relation to the "awful religion" of these old time conveyancers. As I have said the conveyancers were clerics or the clergy. Everything seems to have been arranged in relation to some "Saint's Day." Many of these saints are not known in our Church calendar and the four "Quarter Days" which we know as Christmas, Lady Day, Midsummer and Michaelmas Day, and are the fixed days on which interest and rent is paid throughout England today, are the same days so frequently referred to in the deeds as "The Feast of the Nativity"; The Feast of the Annunciation"; "The Birthday of the Holy St. John", and "The Birthday of St. Michael, the Archangel." All

the oldest deeds are tested on the nearest "Saint's Day." Many of the deeds, up to the date of Queen Elizabeth begin "To all the faithful in Christ . . Greeting;" and the old wills were literally "confessions of faith." Truly,

"They welcomed well, with many a bell,
Each Saint's Day as it came."

Now, let me touch on something, essentially educational to all of us, which we have had to learn once at least in our legal lives, and have mostly forgotten, although, perhaps it is, or was once, a part of our legal birthright.

How did the right of free transfers develop?

(1) The first feuds (feoda) were at the will of the lord to the tenant only;
(2) Then, for a definite time, one or more years;
(3) Next the feuds began to be granted for life, but with no hereditary extension;
(4) Then it became usual not to reject the heir, if he could perform the services, or the heir paid a "relief" on a renewal of the feud.

But up to this time (1100) there was no right in the feudatory to sell or exchange or encumber by his debts or devise his seigniory without the lord's consent. He could not alien his estate, even with the consent of the lord, unless he had obtained the consent of his own apparent, or presumptive heir. I shall give you a visible example of this later, in a deed, one by which Beatrix, in her widowhood, quitclaimed (quiete clamavi) to Alan of Rufford (in 1276), while in the next her son, John Banaster, (in 1294) enfeoffed (enfeofavit) Hugo, the son of Alan, in the land "which before the Justices at Westminster, by the brief of our lord, the king, I have proved." Indeed I will show you several feoffments in which the heir joins.

The road was cleared by a law of King Henry I, which allowed a man to sell his land, which he had himself purchased (Henry I, c. 70), but even then he could not sell what had been transmitted to him in the course of descent from his ancestors, and he could not, by selling, totally disinherit his children. The most he could do was to part with all his own acquisitions, if the deed of purchase ran to him and his assigns *by name;* while he could part with only one-fourth of what he inherited, without the consent of his heir.

Then the real change (1225) was effected by the great Charter of Henry III (9 Henry III c. 33) when subinfeudation of part of the land was permitted, if sufficient was left to answer the services due to the lord. Finally, in 1290 all restrictions were removed by the Act *Quia Emptores* (18 Ed. 1, c. 1) whereby, broadly, all persons were left at liberty to alienate all, or any part, of their lands, at their own discretion.

Right through the centuries into the late Georgian period the language of the deeds continues to recite that the feoffee shall "hold of the same Lord of the fee, by the customs and services as of right due and accustomed." Such is the force of habit. The words take us back to the Statute *Quia Emptores*, which abolished subinfeudation.

If it were not that I am to show you the very deeds themselves, with all their eccentricities of parchment, handwriting, inks, seals and phraseology, I could hardly hope to keep your interest, while I trace the changes from feoffment to a conveyance under the Conveyance Act of Queen Victoria.

The most ancient form of deed, operative by force of the common law, and the most solemn and public, is known as a *Feoffment*, an evidentiary and not a dispositive document: "Know all men that I *have* given and by this my deed have *confirmed*." Feoffare, infeudare, means to give one a feud. He who gives is the feoffer; the person enfeoffed is the feoffee. And the feoffment was not perfected, without the investiture of the tenant, before witnesses, and this ceremony we know by the name of *livery of seizin*. Anciently, at common law, this delivery of physical possession passes title without any writing.

This survives today in ecclesiastical promotions, when we have first the nomination and then the installation of the beneficed clergy, by delivery of the Church Key, the Bible and Ecclesiastical Law. The delivery by the Steward of a copy-hold manor to the new tenant of a rod, is another instance of feudal investiture. In my own English law experience up to 1885, it was never omitted.

You will hardly have forgotten in your Blackstone the account of the delivery to the feoffee of the clod of earth, or a twig, or the hasp or ring of the door.

I can exhibit to you, by the score, deeds with the memorandum of seizin endorsed.

This seizin (seisina), in its pronunciation seems to suggest taking by violence; the latin may be translated as sitting or "squatting" on the land; the same root is in the word possession, it is the equivalent of peace and quiet. It means immediate and quiet possession as contrasted with expectant possession, or reversion. And the tenant, when taking possession of his lord, in the earlier days, took the oath of fealty and did homage "that he did become his man from that day forth, of life and limb and earthly honor."

Now, this ceremony of livery of seizin was of two kinds (1) in law and (2) in fact. If the feoffer merely took the feoffee and his witnesses within sight of the land and said "Yonder is the land I have given you, go take possession," it was styled livery in law. If he personally took him on to the land and delivered the physical possession of some portion, it was livery in fact. And to

give fuller assurance to the gift, it was usual for both parties to attend "the hundred Court" and have the carta, or deed of gift, read in the presence of the Sheriff, or some leading man, but the witnesses only listened, they never signed. Occasionally there was a preambulation of boundaries, and this perhaps was necessary because of imperfect descriptions. Even with the King's deed went the writ to the Sheriff directing the livery or actual delivery of physical possession.

Up to Henry VIII nothing more was necessary than this simple gift (donatio) of lands with livery of seizin.

Writing was not much practiced and a gift on the land before witnesses was longer remembered, some thought. No witness could have suposed the written *donatio,* looking so clean, would be exhibited in the City of Chicago, in the year of Grace 1916. Probably too, livery was due to the fact that it was a matter of high policy that secret dealings with the possession of land should not be encouraged. It survived, until abolished (7 and 8 Vict. c. 76) in 1842.

There is little new under the Sun. I have shown you the feudal system under Pharaoh, sealing of instruments under the ancient Egyptians, the Jews and Persians, and now you will see livery of seizin in the ancient Kingdom of Israel, the delivery of something physical to designate the transfer of title to something immovable.

"Now this was the manner in former time in Israel, concerning changing, for to confirm all things: a man plucked off his shoe and gave it to his neighbor, and this was a testimony in Israel. Therefore the kinsman said unto Boaz, buy it for thee; so he drew off his shoe." (Ruth IV. v. 7.)

These feoffments continued right up to the passing of 3 and 4 William IV c. 74 (1834); "An act for the abolition of Fines and Recoveries and the substitution of more simple modes of assurance."

Before I describe the other forms of deeds, which I am to show you; Bargain and Sale, Lease and Release and Fine and Recovery, Deeds to lead and declare the uses of a fine, etc., I must pave the way by telling you how ecclesiastical ingenuity was responsible for, what the student might justly call, so much confusion. We all remember by name the Statutes of Mortmain; perhaps we all need to read-up before being willing to be quizzed on the subject.

Very early in the history of England, laws were passed prohibiting the alienation of lands to bodies corporate, both temporal and ecclesiastical; particularly the religious houses, whose officers and members, being ecclesiastics, were considered civilly dead; hence the term mort-main, the dead (unprofitable) hand of the Church. The Religious Houses were mostly considered, in framing laws to limit alienation.

It was sound sense on the part of the Crown. The Monastic institutions were accumulating vast wealth and power. They were becoming more and more a fetter on the liberties of England. In spite of all efforts of the Crown, at the Reformation, the landed wealth of the monastic establishments was simply colossal. The lands were held in strict allegiance to the Church, which was inconsistent with feudal tenure. Vast sums left England for Rome, so that England was, at one time. styled, "The Pope's Farm."

Moreover, the corporations did not die, or marry, or create any succession, and so the overlord could get no "reliefs," "wardships," "marriage dues," "escheats," or any sort of feudal services.

But, what the Crown devised, the powerful Church influence essayed by subtle contrivances to circumvent by skilful lawyers (themselves ecclesiastics) and legal fictions, and all the time new legislation was necessary, and seemingly but little efficacious. Had it been completely controlling of the monasteries, possibly the Reformation would have been longer delayed.

The second of King Henry III great Charters provided (9 Henry III., c. 43) that there could be no transfer of land to a Church corporation, without the consent of the Lord, upon pain of forfeiture.

The history of the law of forfeiture, on alienation without license of the overlord, goes back to the foundation of feudal tenure; but fundamental principles did not stand in the way of the Church, for the tenant first conveyed to the religious house, then took the lands back to hold as tenant of the Monastery,—which instantaneous seizin was held not to create a forfeiture,—and then by pretext of some other forfeiture or surrender, the Church society entered into possession as immediate lord of the fee. The Monastery also took deeds to the Bishop, Abbot or Prior, *to the use* of the Church and long-term leases for one thousand years.

This produced in 1270 the Statute *de Religiosis* (7 Ed. I, c. 2) which forbade any *colorable* gift, grant or lease, or any sort of title, to a religious corporation, upon pain of forfeiture, first to the immediate lord, and if not claimed for one year, then to the Crown.

Even this was not sufficient security, for it was seen that the new law only extended to gifts, etc., between the parties themselves, and the astute Church lawyers "abounding in subtle disquisitions," worked out a new device, that of setting up a fictitious claim to the land they desired to possess, and suing out a writ of recovery against the tenant who, by collusion, made no defence. The religious house thus recovered a judgment and

with it the land, and acquired moreover a title by record. This is how *common recoveries* were invented and became the great deed of assurance of the Kingdom.

Finally, these fictitious suits were used to put an end to all fettered inheritances and to bar not only estates tail but remainders and reversions expectant thereon.

These deeds of recovery are quite works of art. I am later to show you three of them. They are written in Court hand, on large squares of parchment, smooth and white; the heading ornamented with elaborate scroll work in pen and ink and engraving. Usually the engraved portrait of the Sovereign was added; and such a portrait appears in all of my specimens.

We lawyers hardly give credit to the Clergy for any share in our legal history.

Again, in 1285, the law stepped in with the Statute of Westminster (13 Ed. I, c. 32) compelling a trial by jury of the plaintiff's rights in these fictitious suits. Even when, five years later, the Statute *Quia Emptores* (18 Edward I, c. 1) abolished all subinfeudation, and gave all men liberty of alienation, the right to convey in mortmain was carefully prohibited.

No bounds, however, could be set to this combination of Church and legal ingenuity, for the lawyers now devised a method of grants to nominal feofees *to the use of* religious houses; the Church took the profits, the seizin remained in the dummy and the Chancellor's Court (*then under the direction of the clergy*) held this nominal owner bound in equity to account to the *cestui que trust* for the profits of the land.

Now, it has taken a long time to get as far as this, but it has been worth while, for we have arrived at the pivotal point of so much that is fundamental of our present modern conveyancing, Uses and Trusts.

But, while the Church did not long enjoy any advantage from this new contrivance, for the Statute, 15 Richard II. c. 5, (1392) provided that *uses* should be subject to the Statutes of Mortmain and forfeitable like the lands themselves, yet the conveyance to *uses* had come to stay and is with us still.

We know that the Statute of Uses (27 Henry VIII. c. 10) today gives efficacy to certain new and special conveyances and enlarges old time powers; thus, a man can, by means of the Statute convey to himself and may create a power to deal with an estate by a future instrument. But this is quite beyond the scope of this talk.

In time, the very publicity given to a transfer by the livery of seizin, made it unpopular, and certain artificial assurances were invented. The first is a *deed or covenant to stand seized to uses*, which only operated on a consideration of blood or marriage, and which has long ago fallen into disuse. The owner simply covenanted to stand seized to the use of wife or child, for life, fee or tail,

and the Statute at once executed the use and put the party intended to be benefitted right into possession.

The next conveyance, introduced by the Statute, was a *Bargain and Sale.*

Before the Statute of Frauds if a Bargain was made for the sale of an Estate and the purchase money paid, but no feoffment executed to the purchaser, the Court of Chancery (which considers as done what it is agreed to be done) considered that the estate ought in conscience immediately to belong to the person who had paid the money and therefore held the bargainor or the vendor to be immediately seized of the land To THE USE of the purchaser. After the passage of the Statute of Uses the purchaser became at once entitled, on payment of the purchase money, to the lawful seizin and *possession*; so that seizin was transferred by a mere bargain and sale without even a deed, and it was presumed that the purchase money was paid for an Estate in fee simple.

Thus the *title* to real Estate depended on a mere verbal bargain and a money payment, or bargain and sale.

But immediately after the Statute of Uses another Statute was passed that every bargain and sale of an Estate of freehold should be by deed *indented* and *enrolled* within six months.

It was to evade this enrollment that the Lease and Release was engineered. The Statute of 1554 (27 Henry VIII. c. 16.) which compelled the enrollment of a Bargain and Sale and gave it consequent publicity, provided that, in default of enrollment an Estate of *freehold*, should not be deemed to pass. The lawyers, therefore, argued that the Act did not apply to a chattel interest, or anything below a freehold, and further there could be no forfeiture of a chattel interest. The intending vendor was made to grant a lease for one year to the would-be purchaser, who, being in possession, was capable of receiving a release of the reversion, which was the freehold; and next day the Release was executed and delivered, which recited the lease of one day earlier, and, presto, the assurance operated as a full assurance of the fee.

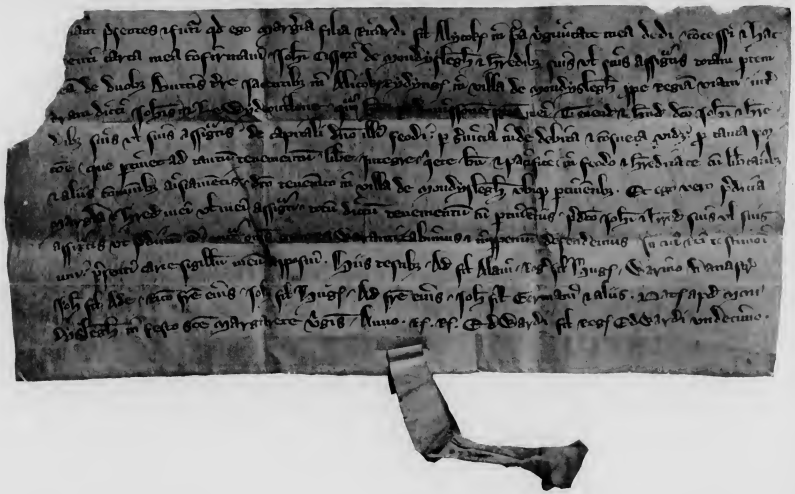
The lease is nearly always found wrapped up inside the more pretentious document, or attached to it by a parchment thong. Every modern English Abstract of title will disclose these deeds.

You have heard something of "Recoveries." Let me tell you what "Fines" were. The words sound familiar "Fines and Recoveries." Few of us can qualify, however, if asked to explain them. We find Fines as far back as the middle of the twelfth century, and history tells us that the idea dates back to Saxon times. A transfer of land by Fine originated at first in an *actual* suit at law to recover possession, and it was found so efficacious that fictitious actions came to be commenced and then terminated with a confession of judgment and a decree. Blackstone tells

us a Fine (finis) is so called because it puts an end to the suit. The first words, if in Latin, are *"haec est finalis concordia,"* or, if in English (and I have some of each), "this is the final agreement." Perhaps the first idea of a suit and judgment was to remove a cloud on title by a decree which foreclosed those not parties. Like a recovery it was a feoffment of record; the livery of seizin being acknowledged in Court. All my deeds of the Stuart period, (17th Century) and to the date of the abolition of Fines and Recoveries in 1834 (William IV) contain a covenant by the Vendor to levy a fine, before a certain term of the Court, this seems to me like a covenant "to put up a job" on the Court, like the modern "Taxpayer's Action." The purchaser sued out a Writ of Covenant, based on an alleged agreement that the owner had covenanted to sell to the plaintiff. The defendant, knowing himself to be in the wrong, is supposed to make overtures of peace to the plaintiff. Then the plaintiff to show his entire good faith applied to the Court for a *licentia concordandi,* or leave to "make up" the matter; we might say to make up the frame-up. This is readily granted, for at every step there is "something in it" for the Crown (three twentieths of the supposed annual value). Then came the agreement itself (*concordia*) that the land is really the right of the plaintiff. The acknowledgment by defendant was made in open Court; proclamation was duly made; the "note" of the fine (which recited the whole matter) was engrossed and delivered to plaintiff (cognizor) and defendant (cognizee); an abstract of the writ and proceedings was enrolled of record in the proper office, and the curtain fell on this legal farce.

And now, let me show you on the screen, some of the deeds we have been discussing.

The following deeds were then shown by stereopticon, the speaker illustrating each by the modern Latin and English equivalents, and indicating the chief points of interest.



The above deed expressed in the Latin of the period—abbreviations being spelled out—reads as follows:

Line 1 Sciant presentes et futuri quod ego Margeria filia Ricardi filii Alycocks in pura virginitate mea dedi et concessi et hac
2 presenti carta mea confirmavi Johanni Tisson de Maudyslegh et heredibus suis vel suis assignatis totam partem
3 meam de duobus bovatis terrae jacentibus in alycocks rydings in villa de Maudyslegh prope regiam viam inter
4 terram dicti Johannis et Lewydeontion quam habui ex dimissione patris mei Tenendum et habendum dicto Johanni et here
5 dibus suis vel suis assignatis de capitoli domino illius feodi per servicia inde debita et consueta videlicet pro tanta por
6 cione que pertinet ad tantum tenementum libere integre quiete bene et pacifice in feodo et hereditate cum libertatibus
7 et aliis commentis aisiamentis dito tenemento in villa de Maudyslegh ubique pertinentibus Et ego vero predicta
8 Margeria et heredes mei vel mei assignati totum dictum tenementum cum pertinenciis predicto Johanni et heredibus suis vel suis
9 assignatis ut predictum est contra omnes gentes warrantabimus et in perpetumm defendemus In cujus rei testimonium
10 presenti cartae sigillum meum apposui his testibus Adam filius Alian Rogerus filius Hugh Warin Banaster
11 Johanus filius Adam Ricardus frater ejus Johanus filius Hugh Adam frater ejus Johanus filius Erman et aliis Datum apud Mau
12 dyslegh in festo sanctae Margaretae virginis anno regni regis Edwardi filii regis Edwardi undecimo.

The English equivalent of the above Latin is as follows:

KNOW ALL MEN present and future, that I, Margery, daughter of Richard, son of Alycoks, in my pure virginity, have given, granted, and by this my present charter, have confirmed to John Tisson, of Maudyslegh, and to his heirs or assigns, the whole of my share of two butts of land, laying in Alycoks-ridings, in the village of Maudyslegh, near the king's highway, between the land of the said John and Lewydeontion, which I had by demise of my father, to have and to hold to the said John, his heirs and his assigns, of the capital lord of that fee by the services due and customary therefor, to wit: For so great a portion as pertains to a tenement of that extent freely, entirely, quietly, well and peacefully in fee and heirship, with the liberties and other common easements everywhere pertaining to the said tenement in the village of Maudyslegh. And moreover, I, the aforesaid Margery, and my heirs and my assigns, will warrant and defend in perpetuity against all men the whole of the said tenement with appurtenances to the aforesaid John and his heirs and assigns as aforesaid. In testimony whereof, I have set my seal to the present charter. Witnesses: Adam, son of Alian; Roger, son of Hugh; Warin Banaster; John, son of Adam; Richard, his brother; John, son of Hugh; Adam, his brother; John, son of Erman, and others. Given at Maudyslegh on the feast of St. Margaret the Virgin, in the eleventh year of the Reign of King Edward, the son of King Edward.

Feoffment, 13th Century, undated.

Feoffment, A. D., 1270.

Feoffment, A. D., 1318. (See half-tone insert.)

Feoffment, A. D., 1276.

Quit-claim (quiete clamavi), A. D., 1294.

Feoffment, A. D., 1294.

Feoffment, 12th Century, undated.

Grant of right "to dig, cut out and cart away" peat; A. D., 1380.

Grant, with covenant to build, in consideration of an annual rent (quit rent), A. D., 1317.

Feoffment, A. D., 1276.

Release to a knight from being called on juries, he having attained 70 years of age, A. D., 1533.

Feoffment, A. D., 1450 (not translated).

All of the foregoing are in the latin of the period and, in size of parchment, are about 4" × 8":

Lease in English; A. D., 1537, about 5" ×8".

Memorandum of livery of seizin, endorsed on a feoffment. (Latin.)

Memorandum of livery of seizin, endorsed on a feoffment. (English.)

Grant of 2 prebends, A. D., 1590.

A Common Recovery, A. D., 1693. (Latin.)

A Common Recovery, A. D., 1764. (English.)

A Fine (Charles I). (Latin.)

A Fine, 1652. (English.)

A Bargain and Sale, A. D., 1603; not enrolled.

A deed of curious handwriting, A. D., 1667. (English.)

Feoffment, A. D., 1609. (English.)

A Bargain and Sale, reciting a (annexed) previous lease for 6 months. A. D., 1697.

A Deed to lead to the uses of a fine, A. D., 1755.

A Lease and Release (parchments attached by thongs), A. D., 1701.

A Lease and Release, A. D., 1718.

Copyhold manor, admissions of tenant, (1) 1716; (2) 1758.

These deeds also illustrate the engrossing hands; known as Court-hand, common Chancery, small Court-hand, sett Chancery, Secretary-hand.

END OF
TITLE